

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAR 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0379-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
IGNACIO ESTEBAN RIMER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073959

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Ignacio Rimer

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Ignacio Rimer petitions this court for review of the trial court's summary dismissal of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Rimer was convicted after a jury trial of illegally conducting an enterprise, kidnapping, sexual assault, and aggravated assault, and the trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 23.75 years. We affirmed his convictions and sentences on appeal. *State v. Rimer*, No. 2 CA-CR 2009-0100 (memorandum decision filed Jan. 7, 2011). After Rimer filed a notice of post-conviction relief, appointed counsel filed a notice stating he had reviewed the record and found “no tenable issue for review” and requesting, pursuant to *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), that Rimer be permitted to file his own petition.

¶3 Rimer then filed a pro per petition for post-conviction relief, arguing that the state, despite charging him with illegally conducting an enterprise pursuant to A.R.S. § 13-2312(B), instead improperly pursued a theory based on conspiracy. And, as a result, Rimer argued the state failed to prove each element of the charged offense beyond a reasonable doubt and “violated [his] right to be informed of the charge to which he stands accused.” He also contended the state had presented perjured testimony. Finally, Rimer raised claims of ineffective assistance of trial, appellate, and Rule 32 counsel. He asserted trial counsel had failed to argue the state had not proven the charge of illegally conducting an enterprise; agreed to an improper jury instruction related to that charge; did not adequately address the state’s purported use of perjured testimony; and, relevant to the sexual assault charge, did not sufficiently argue that evidence Rimer suffered from erectile dysfunction should be admissible as an “alibi.” Rimer argued appellate and Rule 32 counsel had been ineffective for failing to raise any of the issues he raised in his

petition. Finding Rimer had presented “no colorable claim for relief,” the trial court summarily dismissed Rimer’s petition.¹

¶4 On review, Rimer repeats his arguments that the state failed to prove beyond a reasonable doubt all the required elements of the charge of illegally conducting an enterprise and that his convictions were based on perjured testimony. These claims could have been raised in Rimer’s direct appeal. Thus, he is precluded from raising them in a petition for post-conviction relief and the trial court did not err in summarily dismissing them. *See* Ariz. R. Crim. P. 32.2(a)(3). Rimer also reurges his claim that trial counsel had been ineffective by agreeing to a jury instruction that, he asserts, misstated the elements of illegally conducting an enterprise and in failing to adequately investigate and raise the issue of perjured testimony.

¶5 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). Relying on *Baines v. Superior Court*, 142 Ariz. 145, 688 P.2d 1037 (1984), Rimer maintains that, in order to convict him of illegally conducting an enterprise pursuant to § 13-2312(B), the state was required to show “the commission of a predicate act of racketeering by each defendant” and that the jury instructions given did not reflect this requirement. In *Baines*, this court described the elements of an offense under § 13-2312(B) as follows:

¹The trial court also determined Rimer’s petition had not been filed timely, but it nonetheless considered the merits of his claims.

(1) the existence of an enterprise, (2) that the defendant was employed by or associated with the enterprise, (3) that he conducted or participated in the conduct of the affairs of the enterprise, and (4) that he conducted or participated in the conduct of the affairs of the enterprise through racketeering, i.e., through the commission of at least one predicate offense.

142 Ariz. at 149, 688 P.2d at 1041.

¶6 Rimer points to a portion of the instructions providing that “the state need only prove one racketeering act in relation to the enterprise or the manner in which the enterprise operated.” Even if we agreed with Rimer that, read in isolation, this instruction is inconsistent with *Baines*, Rimer ignores the remainder of the instructions given the jury. Specifically, concerning the charge of illegally conducting an enterprise, the trial court instructed the jury it must find that Rimer “conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise through racketeering activity,” and that “racketeering” encompassed a list of enumerated acts, whether attempted or completed. The jury instructions regarding illegally conducting an enterprise, read as a whole, are consistent with *Baines* and are legally correct. See A.R.S. §§ 13-2301(D)(4); 13-2312(B); see also *State v. Prince*, 226 Ariz. 516, ¶ 77, 250 P.3d 1145, 1165 (2011) (appellate court reads instructions as a whole in determining whether law correctly stated). Accordingly, Rimer has identified no reasonable basis for his trial counsel to have objected to the jury instructions and his claim of ineffective assistance of counsel on this basis necessarily fails.

¶7 Rimer’s claim of ineffective assistance of counsel grounded in alleged perjury also fails. He contends statements by a witness in several pretrial interviews were

inconsistent with both her other interviews and her trial testimony, and he thus concludes her trial testimony constituted perjury. Without explanation or citation to the record, he argues his trial counsel failed to adequately “expose[] this perjurious testimony.” This unsupported assertion is insufficient to establish a colorable claim of ineffective assistance of counsel. *See State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984) (“Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.”); *see also* Ariz. R. Crim. P. 32.9(c)(1) (petition for review “shall contain specific references to the record”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on appeal).

¶8 For the reasons stated, the trial court did not abuse its discretion in summarily dismissing Rimer’s petition for post-conviction relief. Accordingly, although we accept review, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge